No. 91-245

IN THE

Supreme Court of the United States

October Term, 1991

SHELDON STEIN, M.D.,

Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

PETITION FOR A WRIT OF CERTIORARI

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(6686—LC4-116)

Question Presented

Did the administrative judicial processes in New York violate Petitioner's due process rights under the Fourteenth Amendment to the Constitution of the United States in confirming, by the retributive opinions rendered, the unmitigated, ultimate sanction adjudged, depriving him of his right to practice medicine under New York's Education Law (§§ 6510-a[4], 6509[2], 6511[3], per subdiv. (10) of §230 of the Public Health Law)?

Table of Contents.

Page

Question Presented ..... i.

Table of Authorities ..... iv.

Petition for Writ of Certiorari 1

Opinions Below 2

Jurisdiction 3

Constitutional and Statutory Provisions Involved 3

Statement of the Case 6

Reasons for Granting the Writ 17

POINT I. No adequate due process was had by Petitioner before and at the Appellate Division level, adversely affecting his livelihood and right to practice the profession for which he was trained 17

Conclusion 24

Table of Contents to Appendix

A. Order of the New York Court of Appeals, May 9, 1991, Denying Leave to Appeal 1a

B. Opinion of the Appellate Division, January 3, 1991 Unanimously Affirming the Sanction of License Revocation and Dismissing the Petition to Vacate It 3a

Page

C. Appellate Division Judgment Entered January 14, 1991, Dismissing Petition, With Notice of Entry 7a

D. Order of Respondent, Commissioner of Education, Revoking License..... 9a

E. Clarification of Recommendation of Commissioner of Education of a Prior Recommendation, Dated January 12, 1990..... 12a

F. Initial "Recommendation" of Commissioner, Dated June 30, 1989..... 14a

G. Regents Review Committee's Report Rejecting Sanction of License Revocation, Dated February 16, 1990..... 16a

H. Conclusions and Recommendations as to Punishment of the Department of Health's Hearing Committee, January, 1989 ..... 23a

I. Statement of Charges Against Petitioner, Dated March 30, 1988 ..... 30a

J. Affidavit of Petitioner Dated April 30, 1990, on Hearing Review 39a

TABLE OF AUTHORITIES.

CASES:

Barsky v. Board of Regents, 347 U.S. 442, 74 S. Ct. 650, 98 L. Ed. 829..... 6, 14

Board of Regents v. Roth, 408 U.S. 564 (1972)..... 19

Cleveland Bd. of Educ. v. Soudermill, 470 U.S. 532, 105 S. Ct. 1487, 1491-93, 84 L. Ed. 2d 494 (1985) 19

Connecticut v. Doehr, 111 S. Ct. 2105 (June 6, 1991), at pp. 2111-2112..... 18, 21

D'Amico v. Commissioner of Education of State of New York, 167 AD2d 769 (Nov., 1990) 9, 11, 12, 14

Damino v. Barrell, 702 F. Supp. 954 (1988) 18

Foreman v. Ambach, 525 F. Supp. 722, at 726-727 (S.D.N.Y., Weinferd, D. J.)..... 14, 19

In the Matter of Sheldon Stein, M.D., AD2d , 564 N.Y.S.2d 585 (January, 1991)..... *passim*

Mathews v. Eldridge, 424 U.S. 319 (1976)..... 7, 10

Matter of Pell v. Bd. of Educ., 34 NY2d 222, 234 (1974) 14

Milder v. Gulotta, 405 F. Supp. 182, E.D.N.Y. 1975, Aff'd *sub nom.* Levin v. Gulotta, 425 U.S. 901, 96 S. Ct. 1489, 47 L. Ed. 2d 751 (1976) (taken fr. Damino v. O'Neill, 702 F. Supp. 949, 952 (E.D.N.Y. 1987)..... 17

Mitchell v. Association of Bar, 40 NY2d 153 (1976) 17

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (taken fr. Ellender v. Schweiker, 575 F. Supp. 5990 (S.D.N.Y., 1983, I. B. Cooper, D. J.) 20

Pagen v. Goldberger, 551 AD2d 508 (2nd Dep't., 1976), at pp. 511-512..... 19

Page

Randolph v. City of N.Y., 117 AD2d 44, at 50 (1st Dep't 1, 1986), mod. 69 NY2d 844 (1987) 15, 16, 19

Superintendent of Massachusetts Correctional Institution v. Hill, 472 U.S. 445 (1985)..... 17

Ventricelli v. Kinney System Rent-A-Car, 45 NY2d 950, 951-952 (1978)..... 16, 19

Viloria v. Sobol, 152 AD2d 92, 96 21

Whisenhunt et Vir v. Spradlin, et al., 464 U.S. 965, on due process rights of public employees, but Cert. den'd. despite it (1983) 20

STATUTES:

Education Law: §6509..... 4, 10
§6509 (2)..... i, 21
§6510..... 4
§6510 (a)(2)..... 9
§6510-a(4)..... i
§6510 (5)..... 12
§6511..... 5, 9, 12
§6511 (3)..... i

Public Health Law: §230..... 3, 6, 22
§230 (10)..... i, 3
§230 (17)(c)..... 7, 9, 11

28 U.S.C.: §1257 (3)..... 3

United States Constitution, Amendment XIV, §1 3

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ON PETITION FOR CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, THIRD JUDICIAL DEPARTMENT.

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays a writ of certiorari issue to review the judgment of the Appellate Division of the Supreme Court, Third Department, entered January 14, 1991, adjudging affirmance of license revocation, as declined further review by the Court of Appeals of the State of New York on May 9, 1991.

Opinions Below

The Court of Appeals of the State of New York denied leave to appeal from the Appellate Division's unanimous affirmance of the administrative sanction of license revocation and dismissal of Petitioner's Petition to vacate it, without opinion.

Its order is dated May 9, 1991, noted in the New York Law Journal on May 13, 1991 (p. 27, Col. 5). It is reproduced at page 1a of the Appendix hereto.

The Appellate Division's Opinion of unanimous affirmance dated January 3, 1991, is unofficially reported at 564 N.Y.S. 2d 585. It is reproduced in the Appendix at pages 2a-5a. Final judgment of dismissal was entered thereon January 14, 1991 (5a-6a).

The Order of the Commissioner of Education, as Respondent, revoking Petitioner's license to practice medicine in New York, entered March 30, 1990, is reproduced in the Appendix at pages 9a-11a.

The Commissioner's "clarification" of prior "Recommendation" of June 30, 1989, is annexed (Appendix, pages 12a-13a). It is dated January 12, 1990.

His initial "Recommendation", bypassing sanction recommendation of the Department of Health's Hearing Committee, dated June 30, 1989, is reproduced in the Appendix at pages 14a-15a.

The nine (9) page Report of the Respondent's own Review Committee adopting no revocation against Petitioner, is reproduced in the Appendix on pages 16a-22a, and is dated February 16, 1990.

The Conclusions of the Hearing Committee and its recommendations on the charges then pending against Petitioner, appeared in eleven (11) pages of its report to the

Commissioner (pp. 41-51). They are reproduced in the Appendix at pages 23a-29a. That report was issued in January, 1989.

The eight (8) page Statement of Charges against Petitioner, dated March 30, 1988, is reproduced in the Appendix at pages 30a-38a.

Jurisdiction

The Appellate Division's order of unanimous affirmance of the Respondent Board's recommendations for sanctioning the Petitioner was entered in that Court on January 14, 1991. Its opinion is dated January 3, 1991. On May 9, 1991, by order of unanimous denial of leave to appeal from it, the Court of Appeals of the State of New York denied said leave, without opinion.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1257 (3).

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment XIV, §1, provides in pertinent part:

> "* * * nor shall any State deprive any person of * * * property, without due process of law [.]"

§230 (10), New York Public Health Law provides in pertinent part:

> "10. Professional misconduct proceedings shall consist of:
>
> (a) Investigation. * * *
>
> (b) Charges. * * *
>
> (e) Committee Hearing. * * *

(g) *Results of Hearing.* Within thirty days of the conclusion of the hearing, the Committee shall make (1) findings of fact, (2) conclusions concerning the charges sustained or dismissed, (3) and in the event any of the charges have been sustained, a recommendation of the penalty of sanction to be imposed . . .* * *

(i) *Commissioner Recommendation.* Within thirty days after the matter is submitted to him, the commissioner shall consider the transcript, exhibits and other evidence, if any, the findings, conclusions and recommendation of the committee and shall make his recommendation as to the committee's findings, conclusions and recommendation. Within five days of the making of his recommendation the commissioner shall transfer the entire record of the proceeding to the board of regents for final decision and order. * * *"

§6509 of the Education Law, New York State, provides in pertinent part:

" §6509. *Definitions of Professional Misconduct*

Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures prescribed in section sixty-five hundred ten shall be subject to the penalties prescribed in section sixty-five hundred eleven:

(2) Practicing the profession . . . , with gross incompetence, with gross negligence on a particular occasion or negligence or incompetence on more than one occasion . . . * * *"

§6510 of the Education Law prescribes in pertinent part:

§6510. *Proceedings in Cases of Professional Misconduct*

* * *

4. Regents Decision Procedures

c. Regents Decision and Order. The *Board of Regents* (1) *shall consider* the transcript, the report of the hearing panel, and *the report of the Regents Review Committee,* (2) shall decide whether the licensee is guilty or not guilty on each charge, (3) *shall decide what penalties, if any,* to impose as prescribed in section sixty-five hundred eleven of this article, and (4) shall issue an order to carry out its decisions. * * * (emphasis ours)

5. Court Review Procedures. The decision of the Board of Regents may be reviewed pursuant to the proceedings under articles seventy-eight of the Civil Practice Law and Rules. Such proceedings shall be returnable before the Appellate Division of the Third Judicial Department, and such decisions shall not be stayed or enjoined except upon application to such Appellate Division after notice to the department and to the attorney general and upon a showing that the petitioner has a substantial likelihood of success."

§6511 of the Education Law, as applicable, provides in its pertinent part:

"§6511. *Penalties for Professional Misconduct*

The Penalties which may be imposed by the Board of Regents on a present or former licensee found guilty of professional misconduct . . . are: * * *

(3) revocation of license . . . * * * (7) a requirement that a licensee pursue a course of education or training, . . ."

Statement of the Case

This petition challenges New York's present system of disciplining practicing doctors essentially unaltered since enactment of its Section 230 of its Public Health Law in 1975.

This issue of increasing concern, expressed by legislative and executive branches, is important to insure standards of quality care and reduce medical malpractice cases:

Topically, that system, to our present knowledge, has not been modernly addressed in this disturbing context since the Court affirmed the suspension of Dr. Edward K. Barsky's license to practice in its 1954 landmark opinion of *Barsky v. Board of Regents,* 347 U.S. 442, 74 S. Ct. 650, 98L. Ed. 829; there due to his prior federal conviction for not turning over some papers to the U.S. Congress' (House's) then "Un-American Activities' Committee."

The instant petition is timely. Petitioner also maintains it is wholly worthy because the real procedural violation that was committed on this record and is presented for this Court's pending review on the certiorari writ, is the astonishing opinion of judicial affirmance (not appeal) by the Appellate Division of New York State Supreme Court, Third Department.

It confirmed Respondent's (Board of Regents') conclusory and *un*reasoned opinion. It revoked his right to practice his profession in New York in derogation of public policy and the valued concomitant right of prospective patients duly serviced by him. In all documented respects,

and it is uncontested, from 1986-1990, the time of revocation, this now "defrocked doctor" was providing exemplary care.

Petitioner thus urges a violation of due process. (*Mathews v. Eldridge,* 424 U.S. 319 [1976]).

Since July 1, 1978, Petitioner had been consistently practicing medicine in New York, as a licensed physician specializing in orthopedics. On March 30, 1990, New York's Commissioner of Education, Mr. Sobol confirmed revocation through Respondent Board of Regents' total and unreasoned rejection of an internal report of its own "Regents Review Committee." This Committee, after a hearing consideration of evidence, including Petitioner's (App., 18a-19a), concluded the appropriate sanction would be censure and reprimand (App., 22a). This is the minimum that could be imposed (Publ. Health Law, §230 [17][a]). It provides for practice "monitoring". Nonetheless, the Board revoked that license for "professional misconduct."

The Appellate Division, on Article 78 judicial review, dismissed his petition to annul that determination of the State Board of Regents. The Court of Appeals, on timely leave motion, subsequently declined to hear the appeal. It thereby rendered valid the Appellate Division's decision, which went beyond lawful considerations by making new "findings" of fact to validate the punishment i.e., what the Court did was charge Petitioner with proximate cause complications of some patients—something he was never charged with, initially, and so had no notice of, or cause to specifically defend against at the hearing, or at any other time. Furthermore, there was no deliberation or conclusion that he ever caused such injury. Notably, the Review Committee indicated these cases were medically "close" and "difficult" (20a), involving factors unrelated to his care, for which he was charged. Hence, this confirmation of

Respondent's "revocation" of his license is now final. The motion is made within 90 days of the denial on May 9, 1991, denying rehearing by the Court of Appeals.

As a result of that affirmance of Respondent, Board of Regents' rejection of its own "Regents Review Committee's" unanimous holding that such an inappropriate revocation of Petitioner's medical license was too "regressive" a penalty in his case as not justified by the "mitigating factors" it unearthed or he presented to it (no more proof allowed in the Appellate Division) (Report, App., pp. 20a), Dr. Stein suffered the most extreme penalty. He argues it was excessively imposed and lacks rationality and any public interest basis. It directly implicates his inveterate protected right under the Fourteenth Amendment to have earning power and to continue to treat patients as he used to carefully do and has proved himself capable of doing in New York, if allowed.

The public policy implications then, of allowing such prospective patients to share in Petitioner's considerably demonstrated skills, as documented and accepted by the Regents Review Committee's own unanimous analysis of his work from those administrative proceedings and its perspective, Petitioner argues, should reckon this case among those the Court would want to hear. It would want to hear why retributive, raw punishment of a practicing physician violates due process guarantees contrary to the public interest. It also dilutes the health care system in New York, since he has not faltered for years in his salutary patient care.

The revocation penalty, however, was unanimously finalized on such a record by a 5-person Bench of the Appellate Division, after oral argument of counsel. *In the Matter of Sheldon Stein, M.D.,* AD2d , 564, N.Y.S. 2d 585 (January, 1991) (see, App., pp. 3a-6a).

Notably, the Appellate Division contradicted the unanimous "no revocation" finding and its reasoning as adopted on February 16, 1990, by Respondent's own internal Regents Review Committee.

Regents Review Committee. It is that Committee the same Court recently stated, paradoxically, should act "independently" on exacting punishments against professionals like Dr. Stein (*D'Amico v. Commissioner of Education of State of New York*, 167 AD2d 769 [Nov., 1990])—"the Committee failed to independently fulfill its exclusive duty to 'decide what penalties, if any, to impose as prescribed [by Education Law §6511]' (Education Law §6510-a[2])." It has thereby undermined orderly judicial processes by its own novel admission in *D'Amico,* as against its *Stein* ruling (op. cit.).

The Regents Review Committee had seen all the "guilt" transcript proof. It heard and weighed Petitioner's mitigating documentation below. We do not know what the Regents Board may have seen or heard. Petitioner sees no public policy purpose in deterring his further practice, and the Appellate Division does not honestly state any.

The Review Committee sat in statutorily prescribed "review" of the underlying Hearing Committee's (Commissioner of Health's) final recommendation that Dr. Stein should no longer practice medicine in New York. The Health Commissioner had earlier (post-hearing) voted for this ultimate sanction affecting Petitioner's livelihood and his ongoing patients' access to his otherwise demonstrably proper medical care in numerous complex cases—a public weal consideration, to be sure, under the cases; thus one to be preserved (Public Health Law, §230 (17)(c)—"monitoring" doctors for specified time periods).

Significantly, the Regents Review Committee's minimal punitive findings not assessing revocation went untested by Respondent. That Board took no further proof on mitigation of punishment which might explain why its converse revocation penalty was declared without stating any reason for it (App., p. 10a).

Nor, equally significantly, did the Appellate Division take any rebuttal proof on its own novel norms as to actionable "negligence" labelled professional "misconduct" under the Educational Law (§6509) that are nowhere else spelled out (i.e., proximate causal connection between past selective misconduct under certain charges, despite present good, reliable practice of the doctor as documented, with consequent "physical injury" to selective patients; one of the hardest elements for a plaintiff to prove in medical malpractice cases). Yet, the Court now sought to be reviewed has *assumed* this is a proper predicate for this Doctor's license revocation (See, its Concl. at p. 587 of 564 N.Y.S. 2d). That, arguably, side-steps due process (*Mathews, supra*).

Petitioner and his counsel (Nathan L. Dembin, Esq.) specifically raised this due process claim and "CME" (continuing legal education) by Dr. Stein in both Courts; the one of original instance (See, e.g., Stein Affid., on file, p. 00172-00174 of Pet.; Pnt. I, Main Br.; Pnt. II, Dembin Reply Brief in A.D., pp. 8-11; on file), and in motion papers to the Court of Appeals for leave to appeal (See, e.g., "Questions Presented—c)—Was the physician sanctioned because of allegations not charged nor proved in violation of Due Process? d) Were the sanctions imposed without rational basis, disproportionate under the totality of circumstances and excessive?") The points are thus preserved. Earnestly, they are also ripe for review to test due process sufficiency under New York's system of internal "checks and balances."

Not submerging the convincing mitigation proof on punishment under due process for Petitioner, that 3-member Review Committee had unanimously stood for something. It held that, as a former and presently successful or "mitigated" practicing physician, this relatively young (in his 40's) Doctor, previously caught in early cases (1983-1986) on the "nuts and bolts," if you will, of "open reduction and fixation" procedures of some patients—all problematic procedures according to the findings below, with his still showing "exceptional effort" after those past charges of professional "misconduct" were reviewed—had demonstrated remarkable professional acumen. The Committee found, unanimously we re-emphasize, that he had sought and did actually "improve his medical skills in the area of orthopedics" (App., 20a). But, today, he cannot use them, due to the punishment exacted and affirmed.

Thus, it found he should not suffer any unwarranted ban "from utilizing his significant skills to serve the public,"; in sum, that he not be totally banned from future patient access, part of his profession's patina and a public interest concern. Hence, no such extreme penalty was called for here—a "regression," the Committee called it (Exh. G).

Accordingly, by its vote of 3 [not 2-1], no such revocation was recommended for him (Exh. G) (*D'Amico, contra Stein*).

The lone dissenter on the Committee reviewing the file merely adopted a slightly harder course than the "censure/reprimand" of the 2-vote majority. He, too, urged a "*stayed*" time of license suspension for two years, to be joined to the majority's 2-year recommended probationary period for Dr. Stein's continued practice, with monitors as the law provides (Publ. Health Law §230[17][c]). But *continuing* it *should be* (App., p. 5: "While we do not

unanimously agree upon the recommended measure of discipline, we do unanimously agree *that revocation is not appropriate in this case as it overlooks both the difficult and close medical issues involved in the charges and the respondent's [Stein's] own circumstances and efforts to correct any deficiencies in his practice.*" (Our emphasis added). All this was also argued in Court (Pnt. I, AD Br., 6-23). Two Courts bypassed it.

"Nonetheless," as the Appellate Division noted, the entire Regents Board went ahead and summarily "revoked" Petitioner's right to practice; notably, without stating any reason for this ultimate termination of his practice as a fitting punishment for past lapses (*Stein, supra).*

This ultimate punishment under §6511 of the Education Law became effective for him on March 30, 1990 (Ord. of Comm'er Sobol; App., p. 9a). Petitioner lives under its cloud still.

Per the only judicial review propounded by present law on that property deprivation finding (Educ. Law, §6510[5]), on May 3, 1990, Petitioner petitioned the Appellate Division. It was his Court of first instance. He sought to have it annul the revocation for the reasons above advanced. Ironically, he relied on what the Court now says in *D'Amico (supra)* was, or should be an "independent" and "exclusive duty" of said *Review Committee* of the Board who heard proof not just to "recommend," but according to *D'Amico's* verbiage, to affect the professional's right to tend to the public's health needs, i.e., "its exclusive duty to decide what penalties, if any, to impose as prescribed" by law (citing it). (*D'Amico,* p. 771 of 167 AD2d).

On May 9, 1991, on leave to appeal to the Court of Appeals, wherein all of these points were memorialized by counsel's papers in that Court, (*supra,* and Affid. of Mr.

Dembin, sworn to March 6, 1991), that Court, as noted, gave deaf ear by denying the motion without opinion. (____NY2d ____, NYLJ, 5/13/91, p. 27, col. 5 App. 1a-2a).

Therefore, procedurally, the Appellate Division has sat as sole arbiter over Petitioner's career, whether he should have one, or not, without proof permitted there, except that of the prior proceedings on the revocation and complexion that Court placed on them which was not fairly pre-noticed to him by any guidelines in the law.

Revocation had been previously "recommended" administratively by New York's Health Commissioner on January 12, 1990, after a hearing at that level. It was then conducted by the State's Board for Professional Conduct. Mitigation was not then at issue. The full Hearing Committee's findings were thereafter made in January, 1989 (App., pp. 23a-29a), reciting their conclusions.

The Appellate Division mis-characterized the Regents Review Committee's *unanimous* recommendation of *no* revocation for the reasons stated. The Court inaccurately stated that the Regent's Committee's recommendation as to punishment was "divided" on its statement of "a lesser penalty which included probation." (*Stein*, p. 586 of 564 N.Y.S. 2d). That was not the fact at all (Exh. G, App., pp. 20a-22a). All members of that Committee appealed to and took the trouble to describe the "mitigating factors" presented for Dr. Stein's rehabilitation, if needed ("monitoring", Public Health Law, *supra)*, which he furnished through his own efforts. It also considered the prospect of his further honing those "skills" for public benefit (Exh. G, p. 6).

This concern has been a desired goal since New York changed its disciplinary tactics in dealing with physicians

after the medical malpractice "crisis" of the seventies. That concern thereby makes what the Appellate Division said and *did* to Petitioner at this "court-review hearing" as momentous to him as to that public interest he is charged with serving until his voluntary retirement as a licensed physician; not, as here, an involuntary one due to its ruling. (*Foreman v. Ambach,* 525 F. Supp. 722, at 726-727 [S.D.N.Y., Weinfeld, D. J.] contrasting a "doctor" with a "podiatrist").

However, that is not all the Third Department may have done to Dr. Stein in affirming his forced retirement in this manner. It also exacted its own *unwritten* standards on negligence proximately *causing injury* (*Stein,* App., 5a-6a).

In recognizing what it was to later call the "exclusive" and "independently" utilized task of the Regents Review Committee to pass on the range of punishments for professionals (*D'Amico*) i.e., to review the "sanctions" within "one's sense of fairness" so as not to "shock" it for being "disproportionated to the misconduct" (citing landmark *Matter of Pell v. Bd. of Educ.,* 34 NY2d 222, 234 [1974]), the Court addressed Petitioner's "laudable . . . . efforts" to improve himself and his professional constituency in this public policy domain, but it did so paradoxically by charging him with injuries he never caused by *any* proof of *his* proximate cause of them (*Stein,* at p. 587, 564 N.Y.S. 2d);

> "As laudable as these efforts may be *after the fact, the truth remains* that *the patients affected* by petitioner's misconduct *all had to undergo subsequent surgery with its attendant pain and risks as a result of his conduct* [outlining some cases], and highlighting the Patient "G" case a 13-year-old girl, [who] also sustained nerve and muscle damage." (emphasis added)

The Court's conclusion then followed on a license thereby lost to Petitioner (*Id.*):

> "In light of *this type* of *serious consequences to Petitioner's patients as a result of his conduct,* we cannot conclude that *revocation of his license* was a *dis*proportionately *harsh* punishment [cites omitted]."

The Board of Regents only made mention of this one fact: serious consequences (App., 9a).

The Appellate Division conveniently omitted the overwhelming fact that Petitioner had already performed some 500 to 600 successful orthopedic surgeries in the time frame involved in these proceedings, including the types questioned by the State in said proceedings.

The fact that "all had to undergo subsequent surgery . .", as adjudged by the Court, in the case of some patients with whose mistreatment he was charged, was a blatant conclusion of fact not supported by the record, or by the law of proximate cause (see, *Randolph, infra).*

It was an indictment not only *un*charged, *un*addressed and *un*decided below. In these cases, it could well have related to other factors beyond the scope of any doctor's "misconduct" in treating them. Some of these sequelae, for instance, may have resulted from factors like diabetes, osteoporosis, or simply old age. The issue was never litigated.

It follows that to revoke a physician's license on such unfounded, and uncharged medical consequences, in a court opinion like this one (*Stern, op. cit.),* for claimed simple (or even, as charged "gross") "negligent" acts committed some five years before, after the Doctor demon-

strated impressive competence overall, is truly the kind of "regressive" punishment not sanctioned by any law presently stated on New York's books.

As such, Petitioner contends it amounts to precisely what the Review Committee now charged with an "exclusive" duty under *D'Amico, supra*, said it was: a "regressive" penalty to a fault leading to Petitioner's professional demise (Exh. G, App., 20a). As retributive raw punishment, he argues, it is excessive. It serves no useful, nor public purpose. It should be banned; *not* the Physician's right to practice.

Petitioner submits such a conclusion on original "judicial review" after this Court addressed the whole system of former peer-review of physicians in its 1954 *Barsky* holding (no *mens rea*, or subversive activities here by this young Practitioner) unfairly bespeaks a lack of adequate due process to him; and no process to his future patients (See *infra*, "Reasons for Granting the Writ").

It does so particularly when he was not charged with specifications of any *actionable* medical malpractice committed against particular patients under New York's substantive law of "reasonable inference" resulting "as a natural and probable consequence of" a doctor's act or omission, i.e., once they're seen as medical departures from the established norm (*Randolph v. City of New York*, 117 AD2d 44, at 50 [1st Dep't. 1, 1986], mod. 69 NY2d 844 [1987], citing *inter alia, Ventricelli v. Kinney Sys. Rent-A-Car*, 45 NY2d 950, 951-952 [1978]). Nor was he given that fair opportunity to save his license which is and was his due before the Appellate Division, and particularly at that tribunal.

Hence, no protective due process can be said to flow from this "hearing" for Dr. Sheldon Stein, such as it then

was. He suffers thereby, as do those prospective patients of his he would see treated by his demonstrated careful skills but which he cannot use in New York by undue processes. First of a Court—one before which he is entitled to the panoply of full procedure due process under the Fourteenth Amendment.

A writ of certiorari should duly issue to the Court in New York to have this paradox unraveled.

REASONS FOR GRANTING THE WRIT

POINT I

No adequate due process was had by Petitioner before and at the Appellate Division level, adversely affecting his livelihood and right to practice the profession for which he was trained.

As District Judge Mishler recently stated, "The individual physician also has a significant interest in the revocation proceedings as his livelihood and professional reputation are at stake. *Milder v. Gulotta,* 405 F. Supp. 182, E.D.N.Y. 1975, aff'd *sub nom. Levin v. Gulotta,* 425 U.S. 901, 96 S. Ct. 1489, 47 L. ED2d 751 (1976). "(Taken fr. *Damino v. O'Neill,* 702 F. Supp. 949, 952 [E.D.N.Y. 1987].)"

The *Damino* Court goes on to note, although said "property right" in the medical license is a privilege, which the State can retake by revocation, it can only do so "once the due process requirements of notice and opportunity to be heard have been fulfilled, *id.,* p. 953, citing *Superintendent of Massachusetts Correctional Institution v. Hill,* 472 U.S. 445 (1985) and *Mitchell v. Association of Bar,* 40 NY2d 153 [1976]. Petitioner claims that was not done by this Court (*Stein, supra*).

While in *Damino,* no honest claim to such deprivation of due process could be found, this cannot be said of this Petitioner on this record. (See, Exh. G, App., pp. 19a-22a.) *N.B.* in *Damino v. Barrell,* 702 F. Supp. 954 (1988), the Regents Board voted to accept *in toto* the findings of its own Regents Review Committee, even as modified (p. 951 of 702 F. Supp). In the matter at bar, there was an unreasoned rejection by the Board of the Review Committee's recommendation of no revocation.

Furthermore the first occasion that full investigating circumstances were presented was by the Petitioner before the Regents Review Committee.

I

The threefold test of due process as set forth in *Matthews, supra,* pointing to the "private interest" affected; a "risk of erroneous deprivation" through the official procedures used, and the "probable value if any, of additional or substitute safeguards," was re-emphasized by this Court in discussing pre-judgment attachment of real property in very recent *Connecticut v. Doehr,* 111 S. Ct. 2105 [June 6, 1991], at pp. 2111-2112; also rpted 59 U.S.L.W. 4587.

Arguably, Petitioner believes that this threefold test was not met on this record and challenges the manner in which his Article 78 proceeding under New York's CPLR was decided by the Third Department. That Court made unauthorized new fact findings when it determined that Petitioner proximately caused specific injuries to his patients.

It could not permissibly impose upon Petitioner a wholly improper legal standard jeopardizing such a valuable right. The Court proceeded to impose retributive punishment solely through use of a proximate cause test; *inter alia,*

under New York's substantive law of medical malpractice. This, however, is a claim with which Petitioner was never specifically charged. Proximate cause in common-law negligence cases is well settled. *Pagan v. Goldberger,* 551 AD2d 508 (2nd Dept. 1976), at pp. 511-512.

However, this is a matter on which a jury is specifically charged and must reach separate findings. Indeed, there are many cases in which negligence is found by the jury, but no proximate cause. The same tests apply in medical malpractice cases. *Randolph v. City of N.Y.,* 117 AD2d 44, mod. other grnds., 69 NY2d 844 (1987), citing, *inter alia, Ventricelli v. Kinney System Rent A Car,* 45 NY2d 950 (1978).

II

The Appellate Division sat not at its usual intermediate level in *Stein.* Third Department sat here in original jurisdictional review of the Petitioner's right to retain and nurture the most priceless of his property rights—the right to earn a livelihood. It is constitutionally protected (*Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 105 S. Ct. 1487, 1491-93, 84 L. Ed. 2d 494 [1985], *Board of Regents v. Roth,* 408 U.S. 564 [1922]).

For the Court to summarily deprive him (once a practicing doctor) of the most minimal of his due process guarantees under the Federal Constitution even under the guise of benefitting the public still fails to meet due process standards.

This Writ, if granted, could place the whole system of peer-review of physicians and court review of their acts in New York, since the 1975 enactment of its Public Health Law on disciplining doctors (*Foreman v. Aurbach,* 525 F. Supp., 722, 726-727 [1981]), in proper perspective. It could inject it with a due process *octane* it sorely needs to func-

tion, in policing itself. Even the Chief Executive has addressed the medical malpractice problem.

In sum, as a policy concern, this Court cannot allow practicing physicians to be "disbarred" on grounds they are never fairly apprised of, or denied opportunity to meet and contest, cure, and indeed Petitioner fell within this category to his peril.

Accord: See, Diss. of retired Justice Brennan, in *Whisenhunt et Vir v. Spradlin, et al.*, 464 U.S. 965, on due process rights of public employees, but cert. den'd. despite it (1983).

III

Any protected property right deserves and compels full-scale procedural due process. As this Court has stated, in the face of a threat of the property's loss, said process requires that the individual operating under the onus of State action receive " 'notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection.' " *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed 865 (1950) (taken fr. *Ellender v. Schweiker*, 575 F. Supp. 5990 [S.D.N.Y., 1983, I.B. Cooper, D. J.]

New York's limitation of judicial "review" of administrative determinations as to professional punishment under its Education Law is found in landmark *Pell v. Board of Educ. et al.*, 34 NY2d 222, 232, (1974). It was relied on heavily by the Attorney General, as Respondent's counsel. It presents a dilemma in assessing proper standards.

Late Judge Harold Stevens for the Court, after mentioning the history of the Court's "review" powers on "discre-

tionary" matters at the administrative level, reached the following resolution on how much "review" an appellate court should give such determinations (p. 233). The rule is to set aside a punishment "only if the measure of punishment or discipline imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (cites omitted). That was a "question of law." It was a standard apparently also tried to be used by this Third Department Bench in *Stein,* citing *Pell.* It also cited the sex abuse case of *Viloria v. Sobol,* 152 AD2d 92, 96 (*Stein,* at p. 587).

But the Court in *Stein* did not sit in singular appellate review. It sat as a *nisi prius* Court applying an Education Law standard ignoring the fact that injury could result from other causes not attributable to the physician. (Education Law §6509 [2]).

Leading cases in New York (*Davidson v. Conole,* 79 AD2d 42 [3d Dept. 1981]) establish that there is no inferred proximate causal link for a doctor's acts or omissions, unless specifically proven by a preponderance of the evidence.

For the Appellate Division to conclude that "in truth", and "in fact" Dr. Stein proximately caused injury to certain patients, violates his due process rights. He must be apprised of, afforded an opportunity to contest and be permitted to redress charges brought against him where they are first raised (The A.D. in *Stein; Mathews* and *Connecticut v. Doehr,* 111 S. Ct. 2111, 2112, 59 U.S.L.W.). He was never afforded that opportunity because at no time was proximate cause an issue, nor was it specifically proven by a preponderance of the evidence.

For a doctor to be punished so severely under *Pell* by being forced to rebut allegations of not only negligence but,

for the first time, of proximate cause of injuries to his patients at the *nisi prius* level (Article 78) is fundamentally unfair.

The least that can be done for him from the standpoint of due process is to inform the Physician of such charges *before* the Appellate Division conducts its judicial "review."

In the matter at bar, it has made the final punishment depriving him of an essential and valued property right—his license to practice medicine within New York, and potentially nationwide, —on totally unfounded grounds under the Education Law.

In short, the "seriousness" of the "consequences" to the patients relied on by the Appellate Division in its sole *view* of the record (a review specifically rejected by the Regents Review Committee's - Exh. "G") as unfounded and unsupported can have no bearing on his "measure of his punishment." It should not unless New York's statutory definitions of "misconduct" guide and apprise him and other physicians that this is what they face.

In no reasonable way, Petitioner respectfully submits, has the *Pell* standard of his "incompetence, failure" or "negligence" (be it "gross" or not) under the Education Law since 1975 (Publ. Health Law, §230) been met. It speaks of an "impact" on and "to the public generally" (*Pell*, at p. 234). Petitioner has served the public well. (Exh. G. 19a-22a) and, unequivocally possessing "significant skills", and has clearly demonstrated them in greater than 500 surgical procedures during the interval from the cases charged and the revocation.

No one disputes that the State has a legitimate concern to regulate "all professions concerned with health." (*Barsky* 347 U.S., at 449).

That was said in 1954. We are now in the nineties. More needs to be said and reviewed today about the extensive system of peer-review in New York under current state and federal statutory and regulatory guidelines. The potential for abuse is greater and the ramifications and consequences for a physician are nationwide.

Dr. Stein faced what, to his knowledge, no doctor has yet had to face at an Article 78 proceeding. None of the cases cited against him delineate that: Without being given any due process on notice and opportunity to redress the charges under the "risk" of losing his professional license, he confronted without *pre*-notice before the Article 78 Court, an unfounded charge i.e. "in truth" and "in fact," he caused his patients to undergo further surgery and treatment.

IV

The problem of physician discipline, the standards and criteria to be applied, and the role proximate cause plays in determining punishment is not endemic to New York.

Increasingly, as all states in our nation, spurred by federal legislation, play a more aggressive role in physician-monitoring, this problem is of increasing nationwide importance affecting quality of care and practitioners of the medical profession.

Conclusion

Since due process was denied Dr. Stein on this record, and the point was preserved below (*supra*), Petitioner petitions this Court for redress.

Accordingly, a Writ of Certiorari should issue to the Appellate Division, Third Judicial Department rendering the *Stein* opinion; this on fundamental due process grounds deserving of this Court's review. Since *Barsky* came down under different statutory law thirty-one years ago, the issue is ripe. It is one of "fairness" in measuring penalties for physician "misconduct" in the State of New York under its modern Education and Public Health Laws.

Dated: New York, New York
August 7, 1991

Respectfully submitted,

NATHAN L. DEMBIN
Counsel of Record
ANTHONY J. McNULTY
c/o Thurm & Heller
Attorneys for Petitioner
26 Broadway, Suite 1800
New York, New York 10004

APPENDIX A—Order of the New York Court of Appeals, May 9, 1991, Denying Leave to Appeal

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the ninth day of May A.D. 1991

Present,

HON. SOL WACHTLER, Chief Judge, presiding.

3-10 Mo. No. 353

IN THE MATTER

OF

SHELDON STEIN,

Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

STUART M. COHEN
Deputy Clerk of the Court

APPENDIX B—Opinion of the Appellate Division, Third Department, January 3, 1991, Unanimously Affirming the Sanction of License Revocation and Dismissing the Petition to Vacate it

SUPREME COURT

APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT

January 3, 1991 61091

IN THE MATTER

OF

SHELDON STEIN,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

HARVEY, J.

Proceeding pursuant to CPLR article 78 (initiated in this court pursuant to Education Law § 6510-a [4]) to review a determination of the Commissioner of Education which revoked petitioner's license to practice medicine in New York.

Petitioner, a physician specializing in orthopedics, was ultimately charged with 27 specifications of professional misconduct by the Department of Health. These charges pertain to petitioner's treatment, between January 1983 and August 1986, of seven patients referred to as patients A through G. The seven patients' cases represented orthopedic care given by petitioner for fractures of the ankle (patients B, E), arm (patients C, D) and hip (patient F), and for elective surgery on the ankle and wrist (patients A, G). Following a hearing before the Hearing Committee of the State Board for Professional Medical Conduct, it was recommended that all or part of seven of the specifications be sustained, including five specifications of gross negligence and/or gross incompetence, and one specification each of negligence and/or incompetence and inadequate record keeping.[1] The specifications of which petitioner was found guilty generally emanated from his allegedly faulty performance of a surgical procedure known as "open reduction and internal fixation", which consisted of the placement of plates and/or pins to patients' bones to repair fractures.

As a result of this misconduct, the Hearing Committee recommended that petitioner's license to practice medicine be revoked. The Commissioner of Health agreed with the conclusions and recommendations of the Hearing Committee. However, a divided Regents Review Committee, while agreeing with the findings of guilt, recommended a lesser penalty which included probation. Nonetheless, respondent voted to revoke petitioner's license, and such penalty was embodied in an order executed by the Commissioner of Education. Petitioner thereafter commenced this proceeding to review the determination.

---

[1]The Hearing Committee concluded that petitioner's treatment of patient F was appropriate and recommended that all specifications relating to this patient be dismissed.

Initially, we disagree with petitioner's contention that the subject determination is not supported by substantial evidence. Petitioner's arguments in this regard center chiefly around challenging the qualifications and objectivity of the Department of Health's expert witness, Dr. Paul Clark. Nonetheless, as pointed out by respondent, Clark's qualifications and extensive experience as a practicing orthopedist during the period when the misconduct allegedly occurred were amply stated and explored at the hearing. The fact that petitioner's expert disagreed with Clark's conclusions merely created a credibility determination for respondent to resolve as the ultimate fact finder in disciplinary cases (*see*, Education Law § 6510-a [2]; *Matter of Di Marsico v. Ambach*, 48 NY2d 576, 581-582; *Matter of Reisner v. Board of Regents of State of N.Y.*, 142 AD2d 22, 26-27). It is well settled that "a determination * * * may be supported by substantial evidence despite conflicting testimony as to the charges" (*Matter of Holmstrand v. Board of Regents of Univ. of State of N.Y.*, 71 AD2d 725, 726). Here, Clark's testimony, combined with other evidence, adequately established petitioner's guilt with respect to the sustained charges. As for petitioner's allegations of bias, it is notable that throughout Clark's testimony he readily acknowledged those aspects of petitioner's work which were "good" or "excellent", thereby establishing that no irrational prejudice against petitioner existed.

Finally, petitioner vigorously contests that the punishment imposed by respondent was disproportionately harsh in light of the nature of the offenses. We cannot agree. Our reluctance to interfere with a professional licensing authority's disciplinary sanctions is well established (*see, e.g., Matter of Viloria v. Sobol*, 152 AD2d 92, 96). It is only when the sanction imposed is "shocking to one's sense of fairness" or "disproportionate to the misconduct" (*Matter of Pell v. Board of Educ.*, 34 NY2d 222, 234) will we intervene to annul a penalty. Here, petitioner, noting the numerous let-

ters of recommendation from colleagues, points out that the sustained misconduct occurred relatively early in his medical career and he has since participated in significant amounts of continuing education in the area of orthopedics. As laudable as these efforts may be after the fact, the truth remains that the patients affected by petitioner's misconduct all had to undergo subsequent surgery with its attendant pain and risks as a result of his conduct. Several patients suffered deformities, infection, necrosis and wound dehesience while one patient, a 13-year-old girl, also sustained nerve and muscle damage. In light of this type of serious consequences to petitioner's patients as a result of his conduct, we cannot conclude that revocation of his license was a disproportionately harsh punishment (*see, e.g., Matter of Heins v. Commissioner of Educ. of State of N.Y.*, 111 AD2d 535, 536, *lv denied* 65 NY2d 611; *Matter of Villaflor v. Board of Regents of State Univ. of N.Y.*, 109 AD2d 925, 926).

As a final matter, we express some concern over the fact that the Department of Health waited a relatively long period of time before bringing charges against petitioner. Expeditious investigation and prosecution of malpractice charges are essential to protect the public. Nevertheless, our concerns on this point do not alter our view that the penalty in this instance was within respondent's considerable discretion.

Determination confirmed, and petition dismissed, without costs.

MAHONEY, P.J. WEISS, MIKOLL, YESAWICH, JR., and HARVEY JJ., concur.

APPENDIX C—Appellate Division, Third Department, Judgment Entered January 14, 1991, Dismissing Petition, With Notice of Entry

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York, commencing on the 13th day of November, 1990.

PRESENT:

Hon. A. Franklin Mahoney, Presiding Justice,

Hon. Leonard A. Weiss, Hon. Ann T. Mikoll, Hon. Paul J. Yesawich, Jr., Hon. Norman L. Harvey, Associate Justices.

IN THE MATTER

OF

SHELDON STEIN,

Petitioner,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

No. 61091

The above-named petitioner having instituted a CPLR Article 78 proceeding in this Court pursuant to Section 6510-a(4) of the Education Law for a review of a determination of the Commissioner of Education which revoked petitioner's license to practice medicine in the State of New York;

Now, on reading and filing of the Order to Show Cause, and Verified Petitioner sworn to on May 3, 1990, and the Verified Answer and Affidavit in Opposition to Stay of the respondent, Board of Regents of the University of the State of New York, sworn to on June 1, 1990, and said proceeding having been presented during the above-stated term of this court, and having been argued by Nathan L. Dembin, Esq., of counsel for petitioner and by Yvonne Powe, Esq. of counsel for above-named respondent, and after due deliberation the Court having rendered a decision on the 3rd day of January, 1991, it is hereby

ORDERED that the determination be confirmed and the petition dismissed, without costs.

ENTER:

/s/ MICHAEL J NOVACK
Clerk

Dated and Entered: Jan 14 1991

A True Copy

MICHAEL J NOVACK
Clerk

APPENDIX D—Order of Respondent, Commissioner of Education, Revoking License

THE UNIVERSITY OF THE STATE OF NEW YORK,

IN THE MATTER

OF

SHELDON STEIN
(Physician)

Duplicate Original Vote and Order No. 10141

Upon the report of the Regents Review Committee, a copy of which is made a part hereof, the record herein, under Calendar No. 10141, and in accordance with the provisions of Title VIII of the Education Law, it was

VOTED (March 23, 1990): That, in the matter of Sheldon Stein, respondent, the recommendation of the Regents Review Committee be accepted as follows:

1. The hearing committee's 90 findings of fact and conclusions as to the question of respondent's guilt be accepted, and the Commissioner of Health's recommendation as to the hearing committee's findings of fact and conclusions be accepted;

2. Respondent is guilty, by a preponderance of the evidence, of the second specification of the charges based on gross negligence, the ninth specification of the charges based on gross negligence and gross incompe-

tence, the twenty-third specification of the charges based on gross negligence and gross negligence and gross incompetence, the twenty-fourth specification of the charges based on gross negligence and gross incompetence, specification 25a of the charges based on gross negligence and gross incompetence, the twenty-sixth specification of the charges based on negligence on more than one occasion and incompetence on more than one occasion to the extent indicated in the hearing committee report, and the twenty-seventh specification of the charges, and not guilty of the remaining charges;

that the recommendation of the Regents Review Committee be modified as to the measure of discipline and, based upon the serious nature of the misconduct committed and in agreement with the hearing committee and Commissioner of Health, respondent's license to practice as a physician in the State of New York be revoked upon each specification of the charges of which respondent is found guilty; that respondent may, pursuant to Rule 24.7(b) of the Rules of the Board of Regents, apply for restoration of said license after one year has elapsed from the effective date of the service of the order of the Commissioner of Education to be issued herein, but said application shall not be granted automatically; and that the Commissioner of Education be empowered to execute, for and on behalf of the Board of Regents, all orders necessary to carry out the terms of this vote;

and it is

ORDERED: That, pursuant to the above vote of the Board of Regents, said vote and the provisions thereof are hereby adopted and SO ORDERED, and it is further

ORDERED that this order shall take effect as of the date of the personal service of this order upon the respondent or five days after mailing by certified mail.

IN WITNESS WHEREOF, I, Thomas Sobol, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 30th day of March, 1990.

THOMAS SOBOL
Commissioner of Education

(Seal)

APPENDIX E—Clarification of Recommendation of Commissioner of Education of a Prior Recommendation, Dated January 12, 1990

STATE OF NEW YORK, DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER

OF

SHELDON STEIN, M.D.

TO: Board of Regents
New York State Education Department
State Education Building
Albany, New York

I hereby make the following clarifying additions to my June 30, 1989 Recommendation to the Board of Regents, which shall be deemed incorporated in said Recommendation:

C. The Recommendation of the Committee should be accepted in full.

D. The Board of Regents should issue an order adopting and incorporating as its determination the Recommendation of the Committee.

This Clarification of Recommendation is herewith transmitted to those designated below.

Dated: Albany, New York
January 12, 1990

DAVID AXELROD, M.D.
Commissioner of Health
State of New York

Board of Regents
New York State Education Department
Office of Professional Discipline
One Park Avenue
New York, New York 10016-5802
ATT: Lance R. Plunkett
Legal Services Division

NATHAN L. DEMBIN, ESQ.
BOWER & GARDNER
110 East 59th Street
New York, New York 10022

E. MARTA SACHEY, ESQ.
New York State Department of Health
Corning Tower Building, 24th Floor
Empire State Plaza
Albany, New York 12237

APPENDIX F—Initial "Recommendation" of Commissioner, Dated June 30, 1989.

STATE OF NEW YORK, DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER

OF

SHELDON STEIN, M.D.

TO: Board of Regents
New York State Education Department
State Education Building
Albany, New York

A hearing in the above-entitled proceeding was held on May 20, July 18, 22, 25, August 3, 26, September 16, 23 and October 31, 1988. Respondent Sheldon Stein, M.D., appeared by Wood & Scher, Esqs., William L. Wood, Jr., Esq., of Counsel. The evidence in support of the charges against the Respondent was presented by E. Marta Sachey, Esq.

NOW, on reading and filing the transcript of the hearing, the exhibits and other evidence, and the findings, conclusions and recommendation of the Committee,

I hereby make the following recommendation to the Board of Regents:

A. The Findings of Fact and Conclusions of the Committee should be accepted in full;

B. The Board of Regents should issue an order adopting and incorporating the Findings of Fact and Conclusions.

The entire record of the within proceeding is transmitted with this Recommendation.

Dated: Albany, New York
June 30, 1989

DAVID AXELROD, M.D.
Commissioner of Health
State of New York

APPENDIX G—Regents Review Committee's Report Rejecting Sanction of License Revocation, Dated February 16, 1990.

THE UNIVERSITY OF THE STATE OF NEW YORK

IN THE MATTER

OF THE

DISCIPLINARY PROCEEDING

against

SHELDON STEIN

who is currently licensed to practice as a physician in the State of New York.

No. 10141

Report of the Regents Review Committee

SHELDON STEIN, hereinafter referred to as respondent, was licensed to practice as a physician in the State of New York by the New York State Education Department.

The instant disciplinary proceeding was properly commenced and on May 20, July 18, July 22, July 25, August 3, August 26, September 16, September 23, and October 31, 1988, hearings were held before a hearing committee of the State Board for Professional Medical Conduct. A copy of

the statement of charges is annexed hereto, made a part hereof, and marked as Exhibit "A".

The statement of charges was amended during the hearing as set forth in petitioner's July 19, 1988 letter, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit "B".

The statement of charges was further amended during the hearing as set forth in petitioner's November 1, 1988 letter, a copy of which is annexed hereto, made a part hereof, and marked as Exhibit "C".

The hearing committee rendered a report of its findings, conclusions, and recommendation, a copy of which, without attachments, is annexed hereto, made a part hereof, and marked as Exhibit "D".

The hearing committee concluded that respondent was guilty of the second specification of the charges based on gross negligence, the ninth specification of the charges based on gross negligence and gross incompetence, the twenty-third specification of the charges based on gross negligence and gross incompetence, the twenty-fourth specification of the charges based on gross negligence and gross incompetence, specification 25a of the charges based on gross negligence and gross incompetence, the twenty-sixth specification of the charges based on negligence on more than one occasion and incompetence on more than one occasion to the extent indicated in the hearing committee report, and the twenty-seventh specification of the charges, and not guilty of the remaining charges. The eighth specification of the charges and paragraph C(4) of the charges were withdrawn. The hearing committee recommended that respondent's license to practice as a physician in the State of New York be revoked.

The Commissioner of Health recommended, in his June 30, 1989 recommendation, to the Board of Regents that the findings of fact and conclusions of the hearing committee be accepted. A copy of the June 30, 1989 recommendation

of the Commissioner of Health is annexed hereto, made a part hereof, and marked as Exhibit "E".

The Commissioner of Health recommended, in his January 12, 1990 clarification to his June 30, 1989 recommendation, to the Board of Regents that the recommendation of the hearing committee be accepted. A copy of the January 12, 1990 clarification of the Commissioner of Health's June 30, 1989 recommendation is annexed hereto, made a part hereof, and marked as Exhibit "F".

On November 21, 1989 respondent appeared before us in person and was represented by his attorney, Nathan L. Dembin, Esq., who presented oral argument on behalf of respondent. E. Marta Sachey, Esq., presented oral argument on behalf of the Department of Health.

Petitioner's recommendation as to the measure of discipline to be imposed, should respondent be found guilty, was that respondent's license to practice as a physician in the State of New York be revoked.

Respondent's recommendation as to the measure of discipline to be imposed, should respondent be found guilty, was: "Focused and remedial training with specific curriculum designed to deal with problems identified under aegis of *Downstate Medical Center* for minimum 6 mo to 1 yr till demonstrated faculties satisfaction 2. period of physician monitoring for further evaluation of pattern of care 3. additional period of probation".

We have considered the record as transferred by the Commissioner of Health in this matter, as well as respondent's November 6, 1989 brief, petitioner's November 10, 1989 letter, the January 9, 1990 letter forwarded to the parties on our behalf, and the January 12, 1990 clarification of the June 30, 1989 recommendation of the Commissioner of Health with an attached January 17, 1990 cover letter.

We ruled that respondent's November 6, 1989 brief and petitioner's November 10, 1989 letter would be accepted

into the record only in the nature of briefs, memoranda of law, and character references and not as new evidence in this case.

We also ruled, as a matter of discretion, to deny petitioner's request that a transcript be made of this proceeding. Transcripts are not required and are not normally made of Regents Review Committee proceedings concerning Health Department hearing committee cases.

We note that the June 30, 1989 recommendation of the Commissioner of Health did not contain any recommendation concerning the hearing committee's recommendation as to a measure of discipline as required by Public Health Law §230(10)(i). However, both petitioner and respondent argued before us that the Commissioner of Health had recommended revocation of respondent's license to practice as a physician in the State of New York. We gave each party a chance to submit a copy of such a recommendation. The Commissioner of Health subsequently submitted a clarification to his original recommendation, on notice to both parties herein, which we accepted into the record. The Commissioner of Health's clarification accepted the recommendation of the hearing committee calling for revocation of respondent's medical license.

We note that in arriving at the differing measures of discipline which we hereafter recommend, we have taken in to account the following factors:

1. the relative youth of respondent at the time these incidents occurred, in that respondent had only been licensed as a physician between five to eight years during the time of these incidents and had only completed his residency in orthopedics three to six years prior to the various times of these incidents from 1983 to 1986;

2. the significant education and training respondent has taken to improve his skills since these incidents occurred; specifically, his work in orthopedics at Vassar Hospital in which he has performed over 500 orthopedic procedures without complaint under close scrutiny of auditing physicians, his participation in at least 191 hours of Category I Continuing Medical Education courses in various topics in orthopedics, his having earned 100 additional hours of Category I credit for participation in the Orthopedic Self-Assessment Examination and home study program, and his attendance at various conferences and seminars on topics in the practice of orthopedics;

3. respondent's unblemished record since these incidents occurred;

4. the significant praise and favorable evaluation of respondent by physicians who have worked directly with him in treating patients, as evidenced by the numerous character reference letters submitted to us by these physicians;

5. the difficult medical nature of the cases involved in these charges; and

6. respondent's being found guilty of only seven out of 27 specifications of the charges.

While we do not unanimously agree upon the recommended measure of discipline, we do unanimously agree that revocation is not appropriate in this case as it overlooks both the difficult and close medical issues involved in the charges and the respondent's own circumstances and efforts to correct any deficiencies in his practice of orthopedics. Revocation, in our unanimous opinion, would be a regressive penalty, depriving this relatively young doctor,

who has shown exceptional effort in striving to improve his medical skills in the area of orthopedics, from utilizing his significant skills to serve the public.

We unanimously recommend the following to the Board of Regents:

1. The hearing committee's 90 findings of fact and conclusions as to the question of respondent's guilt be accepted, and the Commissioner of Health's recommendation as to the hearing committee's findings of fact and conclusions be accepted;

2. The hearing committee's and Commissioner of Health's recommendations as to the measure of discipline not be accepted;

3. Respondent be found guilty, by a preponderance of the evidence, of the second specification of the charges based on gross negligence, the ninth specification of the charges based on gross negligence and gross incompetence, the twenty-third specification of the charges based on gross negligence and gross incompetence, the twenty-fourth specification of the charges based on gross negligence and gross incompetence, specification 25a of the charges based on gross negligence and gross incompetence, the twenty-sixth specification of the charges based on negligence on more than one occasion and incompetence on more than one occasion to the extent indicated in the hearing committee report, and the twenty-seventh specification of the charges, and not guilty of the remaining charges.

   By a vote of two to one Simon J. Liebowitz, Esq., and Robert J. Mangum, Esq., recommend, in light of the preponderant mitigating circumstances previously described herein, the following to the Board of Regents:

4. That respondent be Censured and Reprimanded upon each specification of the charges of which we recommend respondent be found guilty, and respondent be placed on probation for two years under the terms set forth in the exhibit annexed hereto, made a part hereof, and marked as Exhibit "G", said terms to include monitoring of respondent's practice of orthopedics and continuing education in orthopedics and patient management.

The undersigned dissents with regard to the measure of discipline and, taking a more serious view of the actual misconduct while still acknowledging the significance of the mitigating factors previously described herein, recommends the following to the Board of Regents:

That respondent's license to practice as a physician in the State of New York be suspended for two years upon each specification of the charges of which we recommend respondent be found guilty, said suspensions to run concurrently, that execution of said suspensions be stayed and respondent be placed on probation for two years under the terms set forth in the exhibit annexed hereto, made a part hereof, and marked as Exhibit "G", said terms to include monitoring of respondent's practice of orthopedics and continuing education in orthopedics and patient management.

Respectfully submitted,

LAURA BRADLEY CHODOS
SIMON J. LIEBOWITZ
ROBERT J. MANGUM

Dated: February 16, 1990

APPENDIX H—Conclusions and Recommendations as to Punishment of the Department of Health's Hearing Committee, January, 1989

CONCLUSIONS

A. PATIENT A:

The Committee concludes the need for removal of a small bone fragment from Patient A's left ankle was not indicated. None of several different chronic symptoms which could have been support for such surgery are indicated. During a two year period between visits to the Respondent by the Patient there was no evidence that such symptoms existed. The hospitalization record of the Patient prepared by the Respondent recites a recent symptomatology about a month after a new racquetball injury. The July, 1986, symptoms alone would not make a surgery appropriate. Findings 6, 9, 10, 12, 13, 14, 15.

The Committee further concludes that the Respondent's records of Patient A are inadequate in that they did not record a documentation of findings supporting surgery. The findings were not adequate to inform a successor physician of the evaluation and treatment of the Patient. Complete findings of the physical examination of the ankle, the status of the ankle for the prior 26 months after initial treatment, the Patient's recent history, a specification of the Patient's current problems, whether a recommended second opinion was ever sought, the care the Patient gave her ankle, or the results of recommended physical therapy were not included. Findings 8, 10, 16, 17, 18.

The Committee unanimously concludes the Respondent practiced with negligence and with incompetence as set forth in Specification 26, allegation A.1, and failed to maintain adequate records for Patient A as set forth in Specification 27, allegation A.2. The Committee further concludes

that allegations of gross negligence and/or gross incompetence should be dismissed.

B. PATIENT B:

The Committee unanimously concludes that the Respondent inserted a fixation plate on the lateral malleolus of Patient B that was too thick. The function of the plate was to align the fragments, with support provided by an external plaster cast. With osteoporetic bone, the strength of the plate was not a critical factor. But, since the plate was to remain in the Patient, the thinnest plate practical should have been used. The Respondent's contention that no other plates were available at Northern Dutchess Hospital is not an adequate rationale to use improper hardware. The operation was not an emergency one. There was time to transfer the Patient to, or to obtain the proper plate from, another hospital where the Respondent had privileges. The Respondent's use of an unnecessarily thick plate risked wound break-down, death of tissue and infection. Findings 22, 23, 24.

The Committee further unanimously concludes the fixation plate was improperly placed with only one screw inserted below the fracture, completely missing the distal end of the fracture fragment. Although osteoporosis may have played a role in a subsequent lack of healing, such was aided and abetted by the poor technique used. Findings 21, 25, 26.

In a Patient who was overweight, osteoporotic, over age 65, and hypertensive, the Respondent demonstrated poor judgment in his choice of thickness of the plate, and poor surgical technique. There was both gross negligence and ordinary incompetence in the treatment of Patient B as set forth in Specifications 2 and 26, allegation B. 1b.

C. PATIENT C:

The Committee unanimously concludes that, with adequate compression of Patient C's fractures on August 1, 1983, bone grafting was not required. However, although compression plating was used, such merely opposed the bone ends and did not compress them. Without compression, bone grafting should have been used. Such was needed to achieve bone healing. Inadequate healing of the first operation was due to inadequate compression because of placement of the screws, and the failure to use grafting, rather than the length of the plate or the number of screws used. The five hole plate used could have been adequate. The plates used were not too thick. Findings 34, 35, 36, 37.

The Committee further unanimously concludes that the four hole plate used on Patient C's ulna in the surgery performed on March 23, 1985 should have been a five hole or a six hole plate. The bone graft used was too small to be adequate. The Respondent's scheduling of a return visit by Patient C two years later was inappropriate; a visit within three months was indicated. Findings 41, 42, 45.

The Respondent was negligent and incompetent in his failure to use a bone graft during the first operation on Patient C, and in the second operation in his use of a plate that was too short, although it did contain an adequate number of screws, and in his use of a bone graft that was too small. Further, the Respondent evidenced gross negligence and gross incompetence in his lack of scheduling a timely follow up on the Patient. Such were as charged in Specifications 9 and 26.

D. PATIENT D:

The Committee unanimously concludes that the Respondent had a choice of using debridement, closure and

a hanging cast, or debridement and an appropriate internal fixation, in his treatment of Patient D on July 7, 1983. He chose to do neither, stating he had to splint the humerus in order to close the skin.

In order to apply the plate used as a splint, the Respondent had to align the bone fragments. At such time, he could have closed the skin without plating being necessary. Once plating was chosen, an appropriately sized plate of six or more holes should have been used, and adequate fixation should have been performed. Such was not done. Although grafting may have assisted the healing process, it was not absolutely necessary. Findings 48, 50, 51, 52.

Again, in surgery on July 24, 1983, the Respondent failed to fix the butterfly and distal fragments of the fracture and did not replace the plate that had proved to be too short. Finding 54.

The Committee unanimously concludes that the Respondent was negligent and incompetent in his use of a short fixation plate and in the adequacy of fixation in his first surgery as set forth in Specification 26, allegations D.1a and D.1b. The Respondent was negligent and incompetent again in his second surgery in the adequacy of fixation of the bone fragments and in his failure to replace the short plate as set forth in Specification 26, allegations D.2a and D.2b.

E. PATIENT E:

The Respondent's own testimony and the unanimous conclusions of the Committee concur that the Respondent's approach to the treatment of Patient E's fracture was improper. As a result of initial errors made by the Respondent, a series of events were set in motion that led to a poor result. Such required an additional operation by the Respondent in which he failed to correct the problem. In consequence, six further operations were required by a successor physician. Findings 62, 64, 66, 68.

The Committee unanimously concludes that in the initial operative procedure performed by the Respondent on February 6, 1986 the Respondent failed to reduce adequately the fibular fracture, inserted a fixation plate that was too short with not enough proper screws, did not adequately reduce the posterior malleolus of the tibia necessary to prevent subluxation of the ankle, and without basis, reported after the operation that Patient E's ankle was stable. Findings 61, 62, 63, 64.

The Committee further concludes that in the operation performed by the Respondent on March 11, he did not use a malleolar screw with a threaded portion that was too long or inappropriate. In the second operation, however, the Respondent failed to reduce the fibular fracture. Findings 65, 66, 67.

The Committee unanimously concludes that the Respondent was negligent and incompetent in his failure to reduce the fibular fracture adequately, in his use of a fixation plate that was too short with not enough screws and in his inadequate reduction of the posterior malleolus of the tibia necessary to prevent subluxation of the ankle. In addition, as a conclusion to such surgery on February 6, 1986, the Respondent incompetently reported that Patient E's ankle was stable. Such were all set forth in Specification 26, allegations E.1a, E.1b, E.1c, and E.1d. The Respondent also failed to reduce the fibular fracture in his negligent and incompetent surgery on Patient E on March 11, 1986, as set forth in Specification 26, allegation E.2b.

F. PATIENT F:

The Committee unanimously concludes that, because of Patient F's advanced age and cardiac disease and because of the possibility of the bed rest required for treatment without surgery leading to pneumonia, the Patient was a proper candidate for a single operative procedure. Hence, the hemiarthroplasty selected and utilized by the Respond-

ent was an appropriate treatment option. Specifications 22 and 26, allegation F.1 should be dismissed. Findings 70, 73.

G. PATIENT G:

The Committee unanimously concludes that there was no documented indication for the Respondent's surgery on Patient G. In addition, the experience of both the Respondent and the Assistant Surgeon was woefully inadequate for the performance of the procedure used. The ulnar nerve, rather than the tendon, was improperly used in the surgical procedure directly resulting in the nerve and muscle damage that Patient G sustained. It is concluded the Respondent was grossly negligent and grossly incompetent in his transection of Patient G's left ulnar nerve, in his use of the ulnar nerve to repair Patient G's ulnar joint and in his performance of the surgery when the operation was not indicated, as set forth in Specifications 23, 24, and 25a, allegations G.1, G.2, and G.3. Findings 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90.

RECOMMENDATIONS

The Committee unanimously recommends that five allegations of gross negligence and/or gross incompetence included in specifications 2, 9, 23, 24, and 25a be Sustained; and

The Committee further unanimously recommends that so much of Specification 26 as recites the seventeen allegations of negligence and/or incompetence included in allegations A.1, B.1a, B.1b, C.1c, C.3, C.5, D.1a, D.1b, D.2a, D.2b, E.1a, E.1b, E.1c, E.1d, G.1, G.2, and G.3 be Sustained; and

The Committee further recommends that the allegation of failure to keep adequate records included in specification 27 be Sustained.

The Committee recommends that the penalty of Revocation of the medical license and registration of the Respondent be recommended to the Board of Regents for the consistent pattern of negligence and incompetence evidenced by the Respondent in his practice of the profession.

Dated: Albany, New York
January , 1989

Respectfully submitted,

STANLEY L. GROSSMAN, M.D.
Chairperson
CHARLOTTE S. BUCHANAN
JOHN P. FRAZER, M.D.

APPENDIX I—Statement of Charges Against Petitioner Dated March 30, 1988.

STATE OF NEW YORK, DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER

OF

SHELDON STEIN, M.D.

SHELDON STEIN, M.D., the Respondent, was authorized to practice medicine in New York State on July 1, 1978 by the issuance of License Number 134916 by the New York State Education Department. The Respondent is currently registered with the New York State Education Department to practice medicine for the period January 1, 1986 through December 31, 1988 at 62 Albany Post Road, Hyde Park, New York 12538.

FACTUAL ALLEGATIONS

A. Respondent, on or about January 3, 1983 and at various times through August, 1986, provided medical care to Patient A [Patients denominated by letters are identified in Appendix A] for treatment of her left lower leg and ankle.

1. Respondent, on or about July 7, 1986 at Vassar Brothers Hospital, Poughkeepsie, New York,

removed a bone fragment from the distal end of Patient A's left leg, which was not indicated.

2. Respondent maintained records of Patient A's visits to his office at 62 Albany Post Road, Hyde Park, New York, which did not accurately reflect the evaluation and/or treatment of the Patient.

B. Respondent, on or about November 27, 1984 and at various times through February 22, 1985 provided medical care to Patient B for treatment of her right ankle.

1. Respondent, on or about November 27, 1984, at Northern Dutchess Hospital, Rhinebeck, New York, performed an inadequate internal fixation of a fracture of the lateral malleolus of Patient B's right ankle, in that:

   a. Respondent inserted a fixation plate which was too thick on the lateral malleolus.

   b. Respondent did not properly affix the fixation plate to the lateral malleolus.

C. Respondent, on or about July 23, 1983 and at various times through March, 1986 provided medical care to Patient C for treatment of her left forearm.

1. Respondent, on or about August 1, 1983, at Northern Dutchess Hospital, Rhinebeck, New York, performed inadequate internal fixations of fractures of Patient B's left radius and ulna, in that:

   a. Respondent inserted fixation plates on the radius and ulna which were too short and which did not have enough screws.

b. Respondent used fixation plates on the radius and ulna which were too thick.

2. Respondent, on or about March 28, 1985, at Northern Dutchess Hospital, Rhinebeck, New York, replaced the fixation plate on Patient C's left ulna with a plate which was too short and which did not have enough screws.

3. Respondent, in the aforesaid procedure of March 28, 1985, inserted a bone graft in the left ulna which was too small.

4. Respondent, in the aforesaid procedure of March 28, 1985, used a fixation plate which was too thick on the ulna.

5. Respondent, on or about March 27, 1986, when he saw Patient C at his offices at 62 Albany Post Road, Hyde Park, New York, failed to arrange with the Patient for a timely follow-up visit concerning the status of the Patient's left forearm.

D. Respondent, on or about July 7, 1983 and at various times through August 11, 1983 provided medical care to Patient D for treatment of her right upper arm.

1. Respondent, on or about July 7, 1983 at Northern Dutchess Hospital, Rhinebeck, New York, performed an inadequate open reduction and internal fixation of a fracture of Patient D's right distal humerus, in that:

a. Respondent inserted a fixation plate which was too short.

b. Respondent did not adequately fix the butterfly fragment and distal fragment of the fracture.

c. Respondent did not perform a bone graft, which was indicated.

2. Respondent, on or about July 24, 1983 at Northern Dutchess Hospital, Rhinebeck, New York, performed an inadequate fixation and revision of the fixation hardware of Patient D's right distal humerus, in that:

a. Respondent did not adequately fix the butterfly fragment and the distal fragment of the fracture.

b. Respondent did not replace the previously inserted fixation plate, which was too short, with a plate of appropriate size.

c. Respondent did not perform a bone graft, which was indicated.

E. Respondent, on or about February 6, 1986 and at various times through April 20, 1986, provided medical care to Patient E for treatment of her right ankle.

1. Respondent, on or about February 6, 1986, at Northern Dutchess Hospital, Rhinebeck, New York, performed an inadequate open reduction and internal fixation of a fracture of Patient D's right ankle, in that:

a. Respondent did not adequately reduce the fibular fracture.

b. Respondent inserted a fixtion plate which was too short and which did not have enough screws.

c. Respondent did not adequately reduce the posterior malleolus of the tibia, which was necessary to prevent subluxation of the ankle.

d. Respondent reported in his operative report of the aforesaid February 6, 1986 procedure that after the procedure Patient D's ankle was stable, which was without basis.

2. Respondent, on or about March 11, 1986, at Northern Dutchess Hospital, Rhinebeck, New York, inadequately revised the fixation and hardware he had performed in the operative procedure of February 6, 1986, and performed an inadequate open reduction and internal fixation of the posterior malleolus of Patient E's right ankle, in that:

a. Respondent used a malleolar screw with a threaded portion which was too long to affix the posterior malleolus, which was inappropriate.

b. Respondent failed to reduce the fibular fracture.

F. Respondent, on or about June 1, 1984 and at various times through June 20, 1984, provided medical care to Patient F for treatment of a fracture of her right hip.

1. Respondent, on or about June 5, 1984, at Northern Dutchess Hospital, Rhinebeck, New York, performed a hemiarthroplasty of the Patient's right hip, which was not indicated.

G. Respondent, on or about March 21, 1985, and at various times through November 26, 1985, provided medical care to Patient G for treatment of an injury to her left wrist.

1. Respondent, on or about October 11, 1985, at Northern Dutchess Hospital, Rhinebeck, New York, while performing a repair of the left radial ulnar joint, transected Patient G's left ulnar nerve.

2. Respondent, in the aforesaid procedure, used a portion of Patient G's ulnar nerve to repair the left radial ulnar joint.

FIRST THROUGH TWENTY-FOURTH SPECIFICATIONS

PRACTICING WITH GROSS NEGLIGENCE

AND/OR GROSS INCOMPETENCE

Respondent is charged with practicing the profession of medicine with gross negligence and/or gross incompetence under N.Y. Educ. Law §6509(2) (McKinney 1985) in that the State Board for Professional Medical Conduct [hereinafter referred to as "Petitioner"] alleges:

1. The facts in Paragraphs A and A.1.

2. The facts in Paragraphs B and B.1(a).

3. The facts in Paragraphs B and B.1(b).

4. The facts in Paragraphs C and C.1(a).

5. The facts in Paragraphs C and C.1(b).

6. The facts in Paragraphs C and C.2.

7. The facts in Paragraphs C and C.3.

8. The facts in Paragraphs C. and C.4.

9. The facts in Paragraphs C and C.5.

10. The facts in paragraphs D and D.1(a).

11. The facts in Paragraphs D and D.1(b).

12. The facts in Paragraphs D and D.1(c).

13. The facts in Paragraphs D and D.2(a).

14. The facts in Paragraphs D and D.2(b).

15. The facts in Paragraphs D and D.2(c).

16. The facts in Paragraphs E and E.1(a).

17. The facts in Paragraphs E and E.1(b).

18. The facts in Paragraphs E and E.1(c).

19. The facts in Paragraphs E and E.1(d).

20. The facts in Paragraphs E and E.2(a).

21. The facts in Paragraphs E and E.2(b).

22. The facts in Paragraphs F and F.1.

23. The facts in Paragraphs G and G.1.

24. The facts in Paragraphs G. and G.2.

TWENTY-FIFTH SPECIFICATION

PRACTICING WITH NEGLIGENCE

AND/OR INCOMPETENCE ON

MORE THAN ONE OCCASION

Respondent is charged with practicing the profession of medicine with negligence and/or incompetence on more than one occasion under N.Y. Educ. Law §6509(2) (McKinney 1985) in that Petitioner alleges:

25. The facts in Paragraphs A and A.1, and B and B.1(a), B.1(b), C and C.1(a), C.1(b), C.2, C.3, C.4, C.5, and D and D.1(a), D.1(b), D.1(c), D.2(a), D.2(b), D.2(c), and E and E.1(a), E.1(b), E.1(c), E.1(d), E.2(a), E.2(b), and F and F.1 and/or G and G.1 and G.2.

TWENTY-SIXTH SPECIFICATION

FAILING TO MAINTAIN ADEQUATE RECORDS

Respondent is charged with committing unprofessional conduct under N.Y. Educ. Law §6509(9) (McKinney 1985) in that Respondent failed to maintain a record for each patient which accurately reflects the evaluation and treatment of the patient within the meaning of 8 NYCRR §29.2(a)(3) (1987), in that Petitioner alleges:

26. The facts in Paragraphs A and A.2.

Dated: Albany, New York
March 30, 1988

Respectfully submitted,

PETER D. VAN BUREN
Deputy Counsel

APPENDIX J—Affidavit of Petitioner Dated April 30, 1990, on Hearing Review

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

APPLICATION OF SHELDON STEIN, M.D.

Petitioner,

for a judgment pursuant to Article 78 of the CPLR,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

State of New York)
) ss.:
County of New York)

SHELDON STEIN, M.D., being duly sworn, deposes and states that:

1. I am the Petitioner in the above-captioned action.

2. During the hearing in this matter before a hearing committee of the Office of Professional Medical Conduct of the New York Deparatment of Health, and particularly

when I was testifying, Dr. George Clark not only sat at the prosecution counsel's table, but also assisted, advised and coached the prosecuting attorney by telling her what questions to ask, changing written questions she would show to him, and proposing to her entire series of questions, including questions on cross-examination.

3. Additionally, Dr. Clark constantly interrupted the prosecuting attorney as she was asking questions of me, and continued to shake his head and otherwise gesticulate in response to questions asked by the prosecuting attorney, as well as in response to answers given to such questions.

SHELDON STEIN, M.D.

Sworn to before me this
30 day of April, 1990.
Eileen Mary Tiess
Notary Public, State of New York
#4669940 Dutchess County
Commission Expires March 30, 1991